

MEMORANDUM FOR: Chief Counsels of DOE Operations and Area Offices

FROM: Eric J. Fygi
Acting General Counsel

SUBJECT: Contingent Legal Liabilities

As part of the Department's financial statement audits, the Office of Inspector General has requested that the Office of General Counsel provide a legal representation letter describing and evaluating any litigation and contingent liabilities pending against the Department, including claims or assessments against Management and Operating (M&O) contractors that the Department indemnifies. I am requesting that all Chief Counsels provide legal representation letters regarding their Office's litigation and contingent liabilities to Jane Taylor, GC-31, Office of the Deputy General Counsel for Litigation, by Monday, October 20, 1997.

There are several qualifications to the matters that must be included in the legal representation letter. Only contingencies, including unasserted claims and assessments, totaling \$10 million per individual claim or \$100 million for groups of similar claims need to be reported. In those instances where claim amounts are unavailable but there is knowledge of claims that could adversely affect Departmental program activities and that would directly and materially affect either the Department's financial position or cost of operations, those claims should also be reported.

Matters existing as of September 30, 1997 as well as those matters that arise between September 30, 1997 and the date of your legal representation letter that are material and should be disclosed in the September 30, 1997 financial statements should be reported. Actual or probable claims or litigation that seek to compel the Department to take programmatic action that could result in increased program costs or adversely affect program activities should be reported. Matters that have been referred to the U.S. Department of Justice and, in the event of an unfavorable outcome, would be resolved by payment from the Judgment Fund should be separately identified and reported.

For all pending claims, and for those unasserted claims in which there is a high probability of assertion and an unfavorable outcome, the following information should be supplied.

1. Case name and number, if applicable;
2. Nature of the claim or assessment including statutory or other legal basis for the claim and all counts;
3. Progress of the case to date, if applicable;

4. How management is responding or intends to respond to the claim or assessment (for example, contest the case vigorously or seek an out of court settlement);
5. Party against whom claim is made and payment source;
6. Claim amounts;
7. Evaluation of the likelihood of an unfavorable outcome and an estimate, if one can be made, of the amount or range of potential loss or impact on the program's operations. If multiple claims or assessments are of the same type and involve a single program, information on that litigation may be reported collectively with appropriate statistics on numbers of cases and probable outcomes.

The following guidance should be used to evaluate contingencies for the likelihood of unfavorable outcome and potential loss:

Contingencies such as potential claims, litigation, and assessments against an entity may need to be either accrued or disclosed in the notes. When some losses exist, the likelihood that one or more future events will confirm the losses, impair an asset or incur a liability can range from:

1. Probable - Likely to occur. Prospects for success are slight, and it is extremely doubtful that claimants will not succeed.
2. Reasonably Possible - Chance is more than remote but less than likely.
3. Remote - Slight chance. Prospects for not succeeding are extremely doubtful, and there is a slight chance that the claimants will succeed.

Each Chief Counsel should request that his/her respective M&O contractor(s) counsel provide contingent liability information based on the criteria set out above. In the representation letter each Chief Counsel prepares for the Office of General Counsel, the Chief Counsels should coordinate responses with their Chief Financial Officers.

If you have any questions regarding this request, please call Gary Stern, Assistant General Counsel for Contractor Litigation, at 202-586-5289 or Jane Taylor at 202-586-1428.